IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2)(b)
Description of case

Second Appeal No. 63 of 2001

Mahipal Singh,
S/o Mr. Baljeet Singh,
R/o Mohalla Chauhanan,
Jaspur, Tehsil Kashipur,
District Udham Singh Nagar ……. Appellant

Versus

Makhkhan Singh (dead)
and others …… Respondents

Date of decision: 30th July, 2004

For the approval of:

Hon'ble Mr. Justice P.C. Pant

- Whether the order/judgment should be sent to the reporters for reporting?

- Whether the reporters be allowed to see the judgment?

(Himanshu)
P.A.

RESERVED JUDGMENT

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Versus

Makhkhan Singh (dead)
and others ……..
Respondents

Mr. M.C. Bansal, Advocate assisted by Mr. A.K. Bansal,
learned counsel for the appellant.
Mr. Kailash Tiwari, learned Counsel for the respondents.

Hon'ble P.C. Pant, J.

This second appeal has been preferred under Section 100 of Code of Civil Procedure, 1908 and directed against the judgment and decree dated 05.02.2001 passed by the Mr. R.C. Gautam, the then, learned Additional District Judge, Kashipur, District Udham Singh Nagar whereby he had allowed the civil appeal No. 11 of 2000 setting aside the judgment and order dated 20.01.2000 in misc. civil suit No. 38 of 1996 passed by Civil Judge (Junior Division), Kashipur relating confirmation of the report of the Commissioner and preparation of the final decree in a suit for partition.

2) Brief facts giving rise to this appeal are that a suit bearing No. 77 of 1983 was instituted by Mahipal Singh (plaintiff-appellant) against his brother and sister for partition of the joint property owned by them. The said suit was decreed for partition

on 18.12.1986 by the then Munsif Kashipur declaring the plaintiff's 1/3 share in the property in suit and the preliminary decree was accordingly passed. An appeal was preferred against said preliminary decree by Makhkhan Singh (defendant No. 1) now deceased, which was registered as civil appeal No. 4 of 1987 and disposed of after hearing the parties by judgment and order dated 09.02.1990 passed by the then District Judge Nainital (as at that point of time Kashipur was part of District Nainital). By said judgment and order dated 09.02.1990 the preliminary decree was modified to the extent them plaintiff, defendant No. 1 and defendant No. 2 each one of them were declared to be owners of 1/3 share in the property in suit mentioned in Schedule B only. It was further held in said appeal that plaintiff and defendant No. 1 each had 1/2 share in the property as mentioned in Schedule A of the plaint. As such the preliminary decree became final way back in the year 1990. Therefore, the proceedings for final decree started before the trial Court and commissions were issued for partitioning the property by metes and bounds by the learned trial Court. The earlier report of the Commission (paper No. 19-C) was rejected by the then Civil Judge (junior Division) Kashipur on 02.05.1998 after hearing the parties and the Commissioner was directed to submit a fresh report complying with the appellate Court's order dated 09.02.1990 and to provide exit towards road to all the three parties and also to suggest the compensation if any particular share is indivisible. In compliance of said order dated 02.05.1998, the Commissioner submitted fresh report (paper No. 29-C) against which objections were invited and evidence of the parties were recorded. Learned trial Court heard the parties and confirmed the Commissioner's report (paper No. 29-C) along with the map attached with it by its order dated 20.01.2000 for

partitioning the property in suit by metes and bounds and directed that the final decree be prepared accordingly. Aggrieved by this judgment and order dated 20.01.2000 a civil appeal No. 11 of 2000 was final by defendant No. 1 challenging the order of the learned trial Court confirming the Commissioner's report and directing to prepare the final decree. Said appeal (No. 11 of 2000) was disposed of by the learned lower appellate Court after hearing the parties by an impugned judgment and order dated 05.02.2001 whereby the appeal was allowed and the case was remanded for issuing fresh commission for partitioning the property with metes and bounds. This second appeal has been preferred against that judgment and order dated 05.02.2001 passed in civil appeal No. 11 of 2000.

3) The impugned judgment and order was challenged on several grounds including that the first appeal against the confirmation of Commissioner's report under Rule 14(2) of Order 26 of Code of Civil Procedure, 1908 ('Code' for the sake of brevity) was not maintainable before the lower appellate Court.

4) I heard learned counsel for the parties and perused the entire record including that of the lower Courts.

5) The first submission made on behalf of the plaintiff-appellant is that the order of confirmation or rejection of the Commissioner's report prepared under Rule 14(2) of Order 26 of the Code is not appealable as such the lower appellate Court has erred in law by entertaining the appeal. The submission of the learned counsel for the appellant appears to be misconceived for the reason that order dated 20.01.2000 passed by learned trial Court while confirming the commissioner's report (paper No. 29-C) further directs that the final decree be prepared

accordingly. On perusal of record, I found that in compliance of said order final decree was drawn which is paper No. 46 C/6 to 46 C/9. It is pertinent to mention here that under Section 96 of the Code an appeal is maintainable from every decree passed by a Court exercising original jurisdiction. The word 'decree' has been defined in Section 2(2) of the Code which makes it clear that decree may be either preliminary or final. Now, if we read Section 96 read with Sub section 2 of Section 2 of the Code in the light of section 97 of the Code it becomes ample clear that appeal is maintainable against the final decree also as Section 97 of the Code reads as under:

> *"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."*

As such the civil appeal No. 11 of 2000 preferred before the lower appellate Court was maintainable and the impugned judgment and order cannot be set aside on this ground.

6) However, the impugned judgment and order has been challenged on other grounds also. Learned counsel for the appellant had challenged the impugned order on the ground that the appeal was allowed by the lower appellate Court without indicating any illegality in the order of the trial Court allowed it and as such the impugned order itself was perverse. On perusal of the impugned judgment and order dated 05.02.2001, I found that the sole reason for setting aside the trial Court's order is that the learned trial Court has not discussed evidence of the parties adduced before said Court and reasons for confirming the Commissioner's report are not mentioned in the order of the trial

Court. That reason so given in the lower appellate Court's order dated 05.02.1981 is totally against the record as the learned trial Court while passing the detailed order dated 20.01.2000 has not only mentioned the evidence of the parties but also given sufficient reasons for concluding that the Commissioner's report (paper No. 29-C) deserves to be confirmed. While giving the reasons, learned trial Court has clearly observed that by order dated 02.05.1998, the Commissioner was directed to prepare the three equal shares by metes and bounds so as to provide exit to all the three parties towards the road which the Commissioner has now done. Not only this, learned trial Court has further observed that the party getting dispossessed from a particular portion is proposed to be compensated by valuation of the property as per the Commissioner's report. The objection against valuation for compensation was rejected by the learned trial Court on the ground that if the Commissioner's valuation is wrong what the correct valuation would be, has not been suggested by the objectors. It appears that the learned lower appellate Court without going through the order of the learned trial Court has cursorily observed that no reasons has been assigned for passing the order by the learned trial Court. Rather, learned lower appellate Court in its impugned judgment dated 05.02.2001 has only narrated the facts and the objections raised by the parties and not appreciated the evidence nor has given any reasons that why it did not agree with the reasons given by the learned trial Court.

7) As such the learned lower appellate Court's impugned judgment and order being perverse is liable to be set aside, in the light of the principle of law laid down in Rajappa Hanumantha Ramji V. Channabasappa reported in A.I.R. 2000 S.C. 2108 : (2000) 6 SCC 120.

8) Accordingly, the appeal is allowed and the judgment and order dated 05.02.2001 passed in civil appeal No. 11 of 2000 is set aside and the judgment and order dated 20.01.2000 of the learned trial Court, whereby the Commissioner's report (paper No. 29-C) confirmed and final decree was ordered to be prepared, is upheld. No order as to costs.

Let the lower Court record be sent back.

(P.C. Pant, J.)

Dt. 30th July 2004.
H.Negi